

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Hollister, California)

MV TRANSPORTATION, INC.,

Employer

and

Case 32-RC-4931

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 817, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, including the parties' briefs and arguments made at the hearing, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is a California corporation engaged in the business of providing passenger transportation services at its facility in Hollister, California. During the previous twelve months the Employer has received gross revenue in excess of \$250,000 and has purchased and received products and goods valued in excess of \$5,000 from suppliers located outside the State of California. Accordingly, I find that the Employer is engaged in commerce

within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner seeks to represent a unit of all full-time and regular part-time drivers, dispatchers, safety trainers and bus washers at the Employer's Hollister, California facility, excluding office clerical employees, guards, and supervisors as defined in the Act. The Employer does not dispute the overall appropriateness of this requested unit but contends that Mary Leon, the individual occupying the job classification of Lead Dispatcher, is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the Unit. In this regard, the Employer specifically claims that Leon exercises independent judgment in assigning work to employees and that she effectively recommends personnel actions and responsibly directs other employees in the interest of the Employer. The Petitioner contends that Leon is not a supervisor within the meaning of Section 2(11) of the Act and that she should be included in the Unit. For the reasons set forth below, I find that Leon is not a statutory supervisor and she will be included in the Unit.

THE FACTS

The Employer operates a passenger transportation service in Hollister, California. The Employer purchased the enterprise from another entity in January, 2001. The Employer operates seven days a week and provides regularly scheduled bus service as well as "dial-a-ride" service.

Robert Gonzales became Division Manager when the facility was purchased by the Employer. The parties stipulated that Gonzales is a supervisor under the Act and therefore excluded from the bargaining unit. Chet Bor is the Regional Manager who oversees the Hollister location; he works out of San Jose.

There are approximately 23 individuals working at the facility. There are three full time dispatchers who work weekdays and three bus drivers who work part time as dispatchers on the weekends. One of the full time dispatchers is Leon, who is the Lead Dispatcher and who is sometimes referred to by Gonzales as the Dispatcher Supervisor. Also employed at the facility are bus drivers, a bus washer and a safety trainer.

Leon has worked as a dispatcher at the facility for 13 years. The other two full time dispatchers are Leon's cousin, Caroline Sahagan, and Martina Rodriguez. The three dispatchers have each worked at the facility for over ten years - for the current Employer since January and for the predecessor before then - and have close working relationships. Leon works the early shift which begins at 5:30 a.m. and ends at 2:30 p.m. Another dispatcher arrives at 10:00 a.m. and works until 7:00 p.m. A third dispatcher is scheduled to work three days each week from 7:00 a.m. until 4:00 p.m. On the weekends, there is only one dispatcher working at any given time. Leon earns \$13.25 an hour - 25 cents an hour more than any other dispatcher receives - and she receives time-and-a-half overtime pay in the event she works overtime. Leon's benefits are identical to the other employees.

Leon does not have an office or other private workspace. Leon works together with the other dispatchers in the same location, sharing the same equipment. Leon's primary duties are those typical of a dispatcher: scheduling which driver will drive which bus; making and answering phone calls; insuring smooth service to the customers; submitting monthly reports;

entering information into the office computer; and counting money from the buses' fare boxes. On occasion one of the dispatchers will fill in for a missing driver. Leon will only drive if no one else is available. In the past year, Leon drove on only two occasions.

Employees approach either Leon or Gonzales to request time off. Leon hands time off requests over to Gonzales for approval. In Gonzales' absence Leon will approve such time off requests; however, Leon testified that she has never denied any employee's request. Leon arranges the schedule for the dispatchers, although their schedule rarely varies. For approximately three months Leon also arranged the schedule for the drivers, but at her request Gonzales resumed arranging their weekly schedule. When a dispatcher needs to vary from her normal schedule, Leon will consult the other dispatchers to determine who can trade or cover the time. Leon also makes adjustments in the drivers' schedule after it is posted by Gonzales in response to changes in equipment, personnel or customer needs. She does this by handwriting the new start or end times on the posted schedule and, occasionally, initialing the changes. Sometimes the other dispatchers also make changes on the drivers' schedule, with or without initialing the changes. On those occasions when the dispatchers or drivers need to adjust their schedules, they are under the clear directive of the Employer to avoid overtime if at all possible. Consequently, overtime is rarely accrued as a result of such schedule changes.

Occasionally, one of the other dispatchers will call Leon at home when she is off-duty to ask for her input on solving a problem which has arisen. However, there is no evidence that dispatchers have been directed by the Employer to call Leon at home to discuss work-related issues or that responding to such off hours inquiries is part of Leon's work responsibilities. Approximately once a month, Leon attends a meeting with Gonzales and Armando Trujillo, the safety trainer who the parties stipulated is a member of the unit. Safety, training, equipment and

scheduling issues are discussed at these meetings.

Leon wears a uniform to work, even though Gonzales told her last spring that she and Trujillo were not required to wear them. Leon went to work without a uniform for a few days, but decided to continue to wear it. Because she occasionally is called on to drive a bus when the facility is shorthanded, she prefers to wear the uniform that the drivers and other dispatchers wear.

Gonzales was out of the office for several weeks in the Spring of 2001. On some of these occasions, Gonzales notified the employees that either Leon, or Leon and Trujillo, were in charge. Approximately six weeks before the hearing, Gonzales began working at the Employer's Morro Bay, California facility one day each week. Gonzales misses work intermittently for other obligations.

ANALYSIS

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tuscon Gas and Electric Co.*, 241 NLRB 181, 181 (1979); *NLRB v. Kentucky River Community Care, Inc., et al.*, 121 S. Ct. 1861 (May 29, 2001). Section 2(11) of the Act defines a supervisor as an individual who possesses "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest and involves the use of independent

judgment in a manner which is more than routine or clerical. *Harborside Healthcare, Inc.*, 330 NLRB No. 191 (2000); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). The exercise of some “supervisory” authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer statutory supervisory status on employees. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985); *Advanced Mining Group*, 260 NLRB 486, 507 (1982).

Because supervisory status removes individuals from some of the protections of the Act, only those personnel vested with “genuine management prerogatives” should be considered supervisors and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” S.Rep.No.105, 80th Cong. 1 Sec. 4 (1947); *Ten Broeck Commons*, 320 NLRB, 806, 809 (1996). Furthermore, the Board directs that supervisory status not be found “whenever the evidence is in conflict or otherwise inconclusive on a particular indicia.” *Phelps Community Medical Center*, 295 NLRB 486 (1989).

In the instant matter, I find that the Employer, who contends that Leon is a statutory supervisor, has failed to satisfy its burden of proving that Leon is such a statutory supervisor.

Substitution for Division Manager Robert Gonzales

The Employer presented evidence that on some occasions when Gonzales was away from the facility, Leon was designated as the acting manager. The only additional duty Leon performed on those occasions was signing off on employees’ time off requests. However, Leon performed this task without discretion or the exercise of independent judgment; rather, she simply approved every single request and placed them on Gonzales’ desk for future reference. There was no evidence that Leon assumed any other aspects of Gonzales’ authority with respect to employees when she was allegedly designated “acting manager.”

The Board holds that “the appropriate test for determining the status of employees who

substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks.” *Aladdin Hotel*, 270 NLRB 838, 840 (1984). The evidence in this case is clear that Leon’s alleged substitution for Gonzales occurs only sporadically and that even on those limited occasions she has always spent the substantial portion of her working time performing the routine tasks performed by all the dispatchers. Accordingly, I find Leon’s sporadic designation as “acting manager” in Gonzales’ absence insufficient to make her a statutory supervisor.

Assignment and Direction of Work

The evidence establishes that during the majority of her workday, Leon performs the same work as the other dispatchers. There is some conflict in the testimony regarding the extent to which she assigns and directs the work of others. However, even viewing the evidence in the light most favorable to the Employer, the record does not establish that Leon’s role in the assignment of work ever reaches the level of responsibly directing work of other employees.

The evidence establishes that Leon’s actions of adjusting the schedule of the drivers in response to changing conditions do not involve the exercise of independent judgment. This type of decision making - such as arranging for one driver to finish the route of another driver whose bus has run out of fuel - constitutes “routine decisions typical of lead man positions.” *S.D.I. Operating Partners, L.P., Harding Glass Division*, 321 NLRB 111, 111 (1996). Leon may also make temporary schedule changes to adapt to the facility’s personnel, equipment and customer needs. For example, in response to a driver calling in to report a flat tire, she might contact another driver to see if that other driver is able to assist in completing the tasks of the first driver. However, the record establishes that these assignments are determined in a routine manner, are quite typical of the duties of a non-supervisory dispatcher, and do not involve the exercise

independent judgment; Leon will thus simply contact the drivers one by one until she is able to find an individual to help out. At all times, Leon adheres to the well-established routines of the long-running operation.

Furthermore, even if Leon has the authority to reassign employees from one task to another, the Board has found that “responsibility for planning or designing a project, which may involve determining such matters as the appropriate staffing, materials, and schedule, must be distinguished from the exercise of authority and independent judgment in the role of assigning and directing employees in the accomplishment of the work.” *S.D.I. Operating Partners, supra*. The record supports a finding that Leon’s responsibilities constitute merely assuring appropriate staffing to complete the daily bus routes, rather than directing employees in the accomplishment of their work.

The Employer also asserts that Leon has the authority to approve overtime. However, the Employer has a clear directive to all employees to avoid overtime if possible and all employees use their best efforts to comply with this directive and violate it only when they have no other alternatives. Overtime is never explicitly approved or denied. Rather, when a driver is facing the prospect of working overtime, she will contact whichever dispatcher is on duty to see if it is feasible to make an adjustment that will avoid overtime. When no alternative is available, the driver will simply complete her duties as quickly as possible. Similarly, when there are no feasible staffing alternatives, a dispatcher might work overtime. The record does not demonstrate, however, that Leon is uniquely empowered to make decisions regarding overtime. All dispatchers, and the drivers as well, work collectively to comply with the Employer’s well-established policies.

Leon’s duties as the Lead Dispatcher are consistent with her role as a highly experienced

employee and do not indicate supervisory authority. The Board has long recognized that some more skilled or experienced employees whose primary function is participation in the operating processes of a facility who incidentally direct the movement or operations of less experienced employees, nevertheless are not supervisors because their authority is based on their working skills and experience. *Ten Broeck Commons*, 320 NLRB at 808-809. At issue here is whether the direction that Leon provides requires independent judgment or whether the directions are merely routine. *Id.* I find, consistent with the Board's precedent, that the duties performed by Leon as evidenced in the record do not require independent judgment as required by Section 2(11), but are instead performed in a routine and perfunctory manner. *Id.* at 811. See also *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994), and *Dynamic Science*, 334 NLRB No. 57 (June 27, 2001). I find, therefore, that the Employer has failed to demonstrate that Leon's involvement in the assignment or scheduling of work of other employees and/or her direction of their work establishes her to be a statutory supervisor.

Other Primary Indicia

The Employer contends that Leon has the authority to effectively recommend discipline of employees. In support of this contention, the Employer claims that Leon was involved in the discipline of employees Carlos Gaona and Martina Rodriguez. The evidence contradicts the Employer's contention. Leon was asked to suspend Gaona, a driver, sometime during the summer while Gonzales was out of the office. She refused to do so because she did not believe she had the authority and Chet Bor implemented the suspension. Later, when Gonzales returned, he revoked the suspension. The Employer cites this incident as evidence that Leon exercised her authority to recommend that Gaona *not* be disciplined. The evidence, however, demonstrates that Leon was *asked* to suspend Gaona; she was not asked to perform an independent assessment

of his performance. Nor was Leon able to overrule Bor's decision to implement Gaona's suspension it was only after Gonzales returned and made his own independent evaluation of the situation that Gaona's suspension was lifted. The record does not support an inference that Leon had any meaningful involvement in the decision whether to discipline Gaona.

The evidence of Leon's authority to discipline employees is even weaker in the case of Martina Rodriguez. On two occasions, Leon complained to Gonzales that fellow dispatcher Rodriguez was shirking some of her duties. After each complaint, Gonzales consulted with Rodriguez and Rodriguez's performance improved somewhat. Rodriguez was not disciplined. Leon's action of reporting to her manager the deficient performance of a colleague does not establish that she has any supervisory authority whatsoever in relation to that employee.

Finally, while Leon is occasionally asked for an informal appraisal of a new employee's work performance, Division Manager Gonzales often consults with other employees as well when hiring and he retains the full authority to make hiring decisions. Accordingly, I find that Leon has no authority to hire, fire, reward, promote or discipline employees.

Based on the record and the above analysis, I conclude that Mary Leon does not possess the primary indicia of supervisory authority enumerated in Section 2(11) of the Act. Specifically, I find the record does not demonstrate that Leon has authority, in the interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment. Accordingly, Leon will be included in the Unit herein found appropriate.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time drivers, dispatchers (including lead dispatcher), safety trainers and bus washers, employed by the Employer at its Hollister, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

There are approximately 23 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹ Eligible to vote are those in the voting unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the

¹ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the

election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 817, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before November 23, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

election.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 29, 2001.

DATED AT Oakland California this 15th day of November, 2001.

Veronica I. Clements
Acting Regional Director
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